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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 377

ASA H. WHITFIELD,

Petitioner,

v.

THE STATE OF OHIO.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND BRIEF IN SUPPORT THEREOF.

WM. LOGAN MARTIN,
Attorney for Petitioner.

THOMAS E. KNIGHT, JR.,
Of Counsel.

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ASA H. WHITFIELD,

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v.

THE STATE OF OHIO.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner Asa H. Whitfield files this his petition for writ of certiorari and respectfully shows:

A.

Summary Statement of Matter Involved.

Petitioner was arrested in the City of Cleveland, Ohio on October 2, 1934, upon a warrant issued out of the municipal court of Cleveland, charging the petitioner with (a) unlawfully selling on October 2, 1934, in the City of Cleveland, on the open market, one dozen men's work shirts which had been manufactured by prisoners confined in the Wetumpka Prison of the State of Alabama, such prisoners not being on parole or probation at the time of manufac-

turing such articles; (b) unlawfully selling for shipment to one R. C. Kissack, by railway express from Wetumpka Prison in Alabama to R. C. Kissack in the City of Lakewood, Ohio, six dozen work shirts which had been manufactured by prisoners in the Wetumpka Prison who were not at the time on parole or probation (R. 2-3).

A demurrer to the complaint on the ground that it charged no offence, was overruled (R. 7). The evidence supported the charges. The court found the defendant guilty and imposed a fine of $25.00 and costs (R. 10). The evidence shows also that there was nothing harmful, injurious or deleterious about the goods sold (R. 13).

By appeal the case went to the Court of Appeals for Cuyahoga County, Ohio and the petitioner (appellant) assigned as errors the following among others: That the municipal court erred (a) in overruling plaintiff's demurrer to the warrant (R. 14), and (b) in rendering a verdict contrary to the Constitution of the United States (R. 15). The case was submitted to the Court of Appeals, which on February 18, 1935 affirmed the judgment of the municipal court (R. 15-16), its opinion appearing herein on pages 26-36.

On March 14, 1935 the petitioner filed in the Supreme Court of Ohio a petition in error, assigning among the prejudicial errors against him that the Court of Appeals had erred in affirming the judgment of the municipal court and that the verdict of such municipal court was contrary to the Constitution of the United States (R. 17-19).

On May 15, 1935 the Supreme Court dismissed the petition in error as involving no debatable constitutional question (R. 29)—*Whitfield* v. *Ohio*, 196 N. E. 164. On May 22 the petitioner filed an application for rehearing (R. 23-26), setting out therein that the petition theretofore filed in the Supreme Court on March 14 raised a question arising under the Constitution (a) as to the right of Congress to

divest itself of the power to regulate the interstate shipment of prison-made goods and to delegate this power to the States as it had attempted to do under the provisions of the Hawes-Cooper Act of Congress (45 Stat. at L. 1084); and (b) as to the right of the General Assembly of Ohio (2228-1, 2, General Code of Ohio) to forbid after January 19, 1934 the sale on the open market in Ohio of any goods, wares or merchandise manufactured by prisoners not on parole or probation; the petitioner contending that (c) the Act of Congress is beyond the power of Congress to enact and the Act of the General Assembly of Ohio is beyond the power of the General Assembly to enact; both conditions resting on the ground that neither Congress nor the States have the right to bar interstate commerce in goods not exceptional in their nature; the invalidity of the Act of Congress resting on the additional ground that Congress lacks the power to delegate to the States the right to prevent the shipment of prison-made goods into the States and the sale of such goods in the States (R. 23-26). On May 29, 1935 the Supreme Court of Ohio denied without opinion the application for rehearing (R. 28).

B.

Reasons Relied on for the Allowance of the Writ.

The Hawes-Cooper Act of Congress (*infra* p. 9) undertakes to subject prison-made goods (unless made by prisoners on parole or probation) to the operation and effect of the laws of the several States to the same extent as if such goods had been manufactured in such States. Under the assumed authority of this act the General Assembly of Ohio enacted a law (2228-1, 2, General Code of Ohio) which forbade the sale on the open market after January 19, 1934 of goods manufactured by convicts or prisoners not on parole or probation, and fixed the punishment for the violation thereof.

The petitioner contends: (1) that Congress lacks the power to enact the Hawes-Cooper Act for the reason that its power over interstate commerce is confined to regulating the same, and that by this act Congress undertakes to delegate to the States the power to place an embargo on prison-made goods shipped into such States from other States; and (2) that the legislature of Ohio lacks the power to forbid the sale in the State of Ohio of goods made by prisoners in Alabama and shipped to Ohio for sale on the open market; the goods not being exceptional in their nature. Petitioner contends that under our form of government the power of embargo among the States does not exist, whether its exercise be attempted by either the States or Congress, or through the cooperation of both the States and Congress; the goods sought to be placed under embargo not being exceptional in their nature.

As the result of the prosecution under the warrant petitioner was denied due process of law (R. 6).

In support of the foregoing grounds of application for writ of certiorari the petitioner submits the accompanying brief.

WHEREFORE, petitioner prays that this Court, pursuant to 28 U. S. C. A. § 344, issue a writ of certiorari to review the judgment of the Supreme Court of Ohio dismissing petitioner's petition in error to review the record of the Court of Appeals of Cuyahoga County, wherein the Court of Appeals sustained and affirmed the judgment and sentence of the municipal court of Cleveland, imposing a fine on petitioner for selling in Ohio goods made by prisoners in Alabama who were not on parole or probation.

Respectfully submitted this August 5, 1935.

ASA H. WHITFIELD,
By WM. LOGAN MARTIN,
Attorney.

THOMAS E. KNIGHT, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 377

ASA H. WHITFIELD,

Petitioner,

v.

THE STATE OF OHIO.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Supreme Court of Ohio.

The Supreme Court of Ohio wrote no opinion in the case. The opinion of the Court of Appeals of Cuyahoga County not having been published is contained herein (pp. 26-36).

II.

Jurisdiction.

(a) The statutory provision sustaining the jurisdiction of this Court is contained in 28 U. S. C. A., § 344. There is drawn in question (1) a statute of the State of Ohio (which the court below held valid (which the petitioner contends

is in conflict with the Constitution of the United States; and (2) an Act of Congress (which the court below held valid) which the petitioner contends Congress lacks the power to enact. Petitioner seeks the jurisdiction of this Court on the ground that (3) the statute of Ohio is repugnant to the Constitution of the United States, the decision of the court below being in favor of its validity; (4) that Congress is without the power under the Constitution to enact the Act complained of and which the court below held valid; 28 U. S. C. A., § 344 (b) providing that the power of the Supreme Court to review such a judgment of the highest court of a State "may be exercised as well where the Federal claim is sustained as where it is denied."

(b) The Supreme Court of Ohio dismissed on May 15, 1935, the petition in error filed by the petitioner [(R. 29) *Whitfield* v. *Ohio,* 196 N. E. 164.] An application for rehearing was filed on May 22, 1935 (R. 28) and was denied on May 29, 1935 (R. 28).

(c) The nature of the case and the rulings of the court below bring the case within the jurisdictional provisions of 28 U. S. C. A., § 344, as appears from the following:

1. Petitioner claims the right to sell within the State of Ohio goods made in a prison in Alabama, which are not harmful, injurious or deleterious in their nature and raised this question upon his trial in the municipal court (R. 3, 4, 5, 6, 9-10), in the Court of Appeals (R. 14-15) and in the Supreme Court (R. 18-19, 23-26). The municipal court expressly ruled on a demurrer to the warrant, to which the petitioner excepted (R. 7), and on the motion of the petitioner to quash the warrant, to which the petitioner excepted (R. 9, 10). In order to reach a judgment in the matter, the municipal court was obliged to rule on the statute of Ohio (2228-1, 2, General Code) and on the Hawes-Cooper

Act of Congress (45 Stat. at L. 1084), both of which that court held valid.

2. The conviction of defendant under the statute of Ohio and the Act of Congress referred to, neither of which is constitutional, deprived the petitioner of due process of law (R. 6).

III.

Statement of the Case.

Petitioner adopts as a statement of facts the Summary Statement of Matter Involved as set out in the petition for the writ (pp. 1-3) and adds thereto the following:

It was shown by stipulation that on October 2, 1934, the petitioner, as agent for the State of Alabama, sold to R. C. Kissack in Cleveland on the open market one dozen work shirts for $5.25; that such shirts had been manufactured by prisoners confined in Wetumpka Prison in the State of Alabama, and that at the time of such manufacture such prisoners were not on parole or probation; that the shirts had been shipped to the City of Cleveland by parcel post from Wetumpka Prison to be sold on the open market in the City of Cleveland, and that the shirts were sold in the original package as shipped by interstate commerce and that there was nothing harmful, injurious or deleterious about the goods sold (R. 7-8).

It was further shown by stipulation that on October 2, 1934, the petitioner, as agent for the State of Alabama, sold to R. C. Kissack in Cleveland on the open market six dozen work shirts for a consideration of $31.50; that the shirts were not then delivered to Kissack but petitioner agreed to ship the same to Kissack at Lakewood, Ohio, by railway express from Wetumpka Prison in the State of Alabama; that such shirts had been manufactured by prisoners confined in Wetumpka Prison in the State of Alabama, that at

the time of such manufacture such prisoners were not on parole or probation; that the goods were sold in the original package as shipped by interstate commerce into the State of Ohio and that there was nothing harmful, injurious or deleterious about the goods sold (R. 8).

Upon the evidence submitted the court found the petitioner guilty and fined him $25.00 and costs (R. 10).

IV.

Errors of the Court Below Which Are Relied on in This Petition.

The petitioner relies upon the following points:

1. The Hawes-Cooper Act of Congress, undertaking to extend to states the right to bar the sale on the open market of prison-made goods not exceptional in their nature is authorized by neither the interstate commerce clause nor by any other provision of the Constitution.

2. Sections 2228-1, 2 of the General Code of Ohio, under which the fine was imposed on petitioner for the sale of prison-made goods on the open market in Ohio is in conflict with the interstate commerce clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

3. The trial and conviction of the petitioner for the sale of prison-made goods in Ohio which were not exceptional in their nature, denied petitioner due process of law and equal protection of the laws.

V.

ARGUMENT.

1. (*a*) *Congress Lacks the Power to Enact the Hawes-Cooper Act.*

The Hawes-Cooper Act is as follows:

Chap. 79.—An Act to divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or territory be subject to the operation and effect of the laws of such State or territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Sec. 2. This Act shall take effect five years after the date of its approval.

Approved, January 19, 1929.

(45 Stat. at L. 1084, 48 U. S. C. A., § 65.)

Section 2228-1, General Code of Ohio, provides that:

> After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other State by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this State.

Section 2228-2 provides that:

> Whoever violates any of the provisions of the next preceding section shall be fined not less than $25.00 nor more than $50.00 for the first offense and not less than $50.00 nor more than $200.00 for each subsequent offense. (Effective January 19th, 1934.)

This Court has heretofore declared that Congress lacks the power to bar from interstate commerce goods which are not harmful in their nature. *Child Labor Case* (*Hammer* v. *Dagenhart*), 247 U. S. 251 (62 L. Ed. 1101). In this case the Court in its opinion referred to the *Lottery Case,* 188 U. S. 321 (47 L. Ed. 492), the cases of *Hipolite Egg Company* v. *United States,* 220 U. S. 45 (55 L. Ed. 364), *Hoke* v. *United States,* 227 U. S. 308 (57 L. Ed. 523), *Caminetti* v. *United States,* 242 U. S. 470 (61 L. Ed. 442), and *Clark Distilling Company* v. *Western Maryland Railway Company,* 242 U. S. 311 (61 L. Ed. 326), saying that in each of these instances

> "the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended." 271 (1105).

Referring to the opinion in the case of *In re Rahrer,* 140 U. S. 545 (35 L. Ed. 572), it will be seen that the Court sustained the Wilson Act (after which the Hawes-

Cooper Act is patterned) 26 Stat. at L. 313, on the ground that the power delegated to Congress to regulate commerce was subject to the reserved police powers of the States and that in the exercise of such police powers the State had the right to prohibit commerce in the State in any commodity which endangered the lives, the health, the safety, the welfare or the morals of its people; that as to such commodities the Court held that they could be released by Congress from the protection of interstate commerce upon arrival in that State, so that they might immediately become subject to the local laws of the State enacted for the protection of its citizens from the harm incident to such commerce. The Court held that intoxicating liquor was a thing harmful in its nature, and, hence, where a State prohibited its manufacture or sale within its borders, Congress could properly divest interstate shipments of that article of their interstate character upon arrival in that State, so that such shipments might at once become subject to the police regulations of such State and so that the laws enacted in the exercise of its police powers for the protection of the health, safety and welfare of its citizens, could be enforced upon such shipments from the instant of their arrival and delivery in the State.

The Hawes-Cooper Act proposes to change the basis on which the Wilson Act was declared valid. It is not the character of the goods which are outlawed, but the character of the labor employed in producing the goods. There is nothing harmful in a piece of furniture, a work shirt, an automobile license plate or a package or binder twine merely because it was manufactured wholly or in part by prison labor. Nor do wheat, corn and potatoes produced by prison labor, or coal partly mined by it, differ from those produced or mined by free labor. There is, therefore, no justification in barring them from sale on the

ground that the public health, safety or morals are to be protected.

Prison-made goods upon arrival and delivery in the state of destination are not made subject to laws enacted merely in the exercise of the state's police powers, but they are made subject to any class of laws which the state may enact. Their treatment does not enable the state to protect the public health, safety and welfare through its police powers, but to protect from competition those who may be engaged in the manufacture or sale of goods of like kind.

The power to regulate is to "prescribe the rule by which commerce is to be governed". *Gibbons* v. *Ogden,* 22 U. S. (9 Wheat.) 1, 196 (6 L. Ed. 23, 70).

The power to regulate navigation is "the power to prescribe rules in conformity with which navigation must be carried on". *Cooley* v. *Board of Wardens,* 53 U. S. (12 How.) 299, 316 (13 L. Ed. 996, 1003).

From the beginning the states were zealous to protect their complete rights over all commerce crossing their borders. Under the Articles of Confederation (Art. IV), goods in interstate commerce were subject to the same duties, impositions and restrictions as goods manufactured in the state of destination. If the laws of the state of destination prohibited the manufacture or sale in that state of certain goods, then no such goods imported from another state could be sold in the first state because the imported goods were subject to the state laws upon their arrival and delivery in the second state. Under the Hawes-Cooper Act Congress attempts, by divesting interstate shipments of prison-made goods of their interstate character upon their arrival and delivery in the state of destination, to make them immediately subject to state laws as fully as if manufactured in that state just as was the case of interstate shipments under the Confederation.

It was this difficulty arising out of interstate commerce that led to the Annapolis Convention of 1786, which in turn resulted in the Convention of 1787.

(b) *Congress Cannot Delegate Its Powers.*

An attempt by Congress to divest itself of any powers is as contrary to the Constitution as is the usurpation by Congress of a power not granted under the Constitution. By attempting to delegate power to the states to share in the regulation of interstate commerce in prison-made goods, by passing an act which attempts to divest a shipment of such goods of its interstate character at an earlier time than interstate shipments of other goods become divested of their interstate character, Congress attempts partially to divest itself of its exclusive power to regulate interstate commerce. By such action each state would secure earlier control of prison-made goods as a result of their being released from the protection afforded interstate shipments and thus such goods would become subject to State laws upon their arrival and delivery in the state of destination. Congress accepts the shipment as a part of interstate commerce and exercises its exclusive power to regulate the shipment during a part of its journey, and then attempts to delegate to the state the power to regulate during the remainder of the journey by abandoning control of the shipment while in transit—that is, before sale. This cannot be done. The interstate jurisdiction attached to the shipment must continue throughout.

It is assumed by its advocates that under the Hawes-Cooper Act states can prohibit the sale of prison-made goods within their borders, and Ohio has enacted such a law (*supra*, p. 10) prohibiting the sale of prison-made goods within its borders. This is an attempted delegation by Congress to the States. Congress has no authority to

delegate any power to any state and no state has the authority to exercise such power over interstate commerce, even if Congress attempts to delegate it. Such an Act is unconstitutional both as an attempted delegation which Congress of itself undertakes to return to the States and as an attempted exercise by the states of a power prohibited to them.

No one has before ventured the assertion that the framers of the Constitution intended to authorize Congress, in the exercise of a limited and exclusive power merely to regulate commerce, to withdraw from interstate shipment the protection of its interstate character whenever Congress pleased, and to make that shipment subject to local state laws, control and inhibitions, which might prohibit such commerce and which had been found to be so destructive thereof. Under the plan of the framers the states impliedly agreed not to exercise their power to prohibit such commerce, and they certainly never granted Congress the right to prohibit it. The purpose was to free it from restraint, to promote, foster and encourage it.

The legislative power to regulate commerce can be exercised only by Congress. It cannot delegate to the various states power to legislate on interstate commerce. It cannot do by indirection what it cannot do directly. It cannot by indirection confer on any state power to legislate on interstate commerce by arbitrarily declaring as to certain shipments which have come within the protection of interstate commerce, that they are divested of their interstate character at a certain time, and thereby empower the states to enact legislation controlling them; while holding that other goods retain this character for a longer period. Congress cannot delegate power to a state to control a part of interstate commerce, and retain control of the rest. It cannot authorize state control of some

form of that commerce for a part of the time and yet exercise exclusive control over the balance for all the time. It cannot surrender control to the States of prison-made shirts moving in interstate commerce any earlier than it surrenders to their control shipments of steel and iron. Congress has no power, at its whim, to withdraw from an interstate shipment the protection of its interstate character, when that character has once attached and been recognized by Congress; and thereby subject that shipment, while still moving in the recognized channels of interstate commerce, to the regulations or prohibitions of any state.

> "* * * it may be admitted, that Congress cannot give a right to a state, in virtue of its own powers. * * *." *Gibbons* v. *Ogden*, 9 Wheat. 1, 202 (6 L. Ed. 23, 71).
>
> "* * * Nor can Congress transfer legislative powers to a State nor sanction a State law in violation of the Constitution; and if it can adopt a State law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power (citing cases)." *In re Rahrer, supra*, 560 (576).
>
> "The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. * * * Ib. 555 (574)
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> * * * * * * *
>
> "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. * * * Ib. 560 (576)
>
> * * * * * * *

As Congress cannot delegate any of its powers to regulate interstate commerce, it cannot delegate any power to prohibit such commerce.

In *South Carolina* v. *United States*, 199 U. S. 437 (50 L. Ed. 261), we find the following rule repeated:

> "To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants." 450 (265)

The Court quoted from *McCulloch* v. *Md.*, 4 Wheat. 316, 431 (4 L. Ed. 579, 607), as follows:

> "* * * Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.' * * *" 455-6 (267)

* * * * * * *

The Court said further:

> "* * * The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government. * * *" 456 (268)

(2, 3) *The law of Ohio forbidding the sale of prison-made goods shipped in interstate commerce into the state, is in conflict with the interstate commerce clause, and the trial*

and conviction of the petitioner for the sale of such goods denied him due process and equal protection of the laws.

The reverse of the question of the power of Congress to enact such laws as were considered by this Court in the *Child Labor Case, supra,* and the *Child Labor Tax Case,* 259 U. S. 20 (66 L. ed. 817), has been presented in the case of State laws which have been held to interfere with interstate commerce and which undertook to reach such a shipment and to interpose state regulation before the interstate journey was completed. This Court has not failed to strike down such laws. The question now arises: If a State cannot of its own power surround an interstate shipment with restrictions after it comes within the borders of the State and before the package is broken, can Congress by a mere enactment vest the State government with the power heretofore denied it?

Could Congress have permitted Maryland to impose a tax of $50 upon all importers of foreign goods [*Brown* v. *Maryland,* 25 U. S. (12 Wheat.) 419 (6 L. Ed. 678)]?

Could Congress have vested Tennessee with the power to impose a tax on a drummer not having a regular licensed house of business in the taxing district [*Robbins* v. *Shelby County Taxing District,* 120 U. S. 489 (30 L. Ed. 694)]?

A sale is as much a part of the interstate commerce journey as is crossing the State border into the State of destination. This was decided early in the history of this country and the opinion written by Marshall who had sat as a member of the convention in Virginia which ratified the Constitution (Elliot's Debates, Vol. 3, 35). Thirty-six years thereafter in *Brown* v. *Maryland, supra,* he said that there was no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country [439 (685)]; that the act denied to the importer the right of using the privilege

which he had purchased from the United States, until he should have purchased it from the state [443 (687)].

> "The oppressed and degraded state of commerce, previous to the adoption of the constitution can scarcely be forgotten. * * * It may be doubted, whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by congress. * * * 445-6 (688).
>
> * * * * * * *
>
> "* * * To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. * * * 447 (688).

The Court inquired if this law were held valid,

> "what should restrain a state from taxing any article passing through it, from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another, for commercial purposes. * * * 449 (689).
>
> "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles." 449 (689).

In *Robbins* v. *Shelby County Taxing District, supra,* the Court said:

"It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or, when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. * * * 493 (696).

* * * * * * *

"In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. 494 (696).

* * * * * * *

"* * * Can the State Legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them. 496-7 (697).

* * * * * * *

"* * * And if a State can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes which led to it." 498 (698).

From the *State Freight Tax*, 82 U. S. (15 Wall.) 232 (21 L. Ed. 146), we take the following:

"* * * Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. * * *" 275 (161).

In *Ward* v. *Maryland*, 79 U. S. (12 Wall.) 418 (20 L. Ed. 449), involving an act imposing a $300 license tax on non-residents selling by sample, the Court said:

"Evidence to show that the framers of the Constitution intended to remove those great evils in the government [inequality of burden and want of uniformity in commercial regulations[1]] is found in every one of the sections of the Constitution already referred to, [interstate commerce, equality of privileges and immunities among citizens, duties on imports and exports, and tonnage clauses[1]] and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, showing that Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations. Strong support to the same view is also derived from the succeeding clause in the same section of the Constitution, which provides that vessels bound to or from a State shall not be obliged to enter, clear, or pay duties in another." 431 (453).

United States v. *E. C. Knight Company*, 156 U. S. 1 (39 L. Ed. 325) arose out of an attempted enforcement of the anti-trust act of Congress. The American Sugar Refining Company undertook to acquire four companies doing business in Pennsylvania and which controlled thirty-three per cent. of the sugar business of the country; thus giving the American Company control of ninety-eight per cent. of all the sugar in the country.

"* * * Commerce among the States, as this court has declared, is a unit, and in respect of *that* commerce this is one country, and we are one people. It may be regulated by rules applicable to every part of the United States, and state lines and state jurisdiction cannot interfere with the enforcement of such rules. * * * Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be

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[1]Matter in brackets supplied.

carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. * * *" 32-3 (336).

The Court declared that under the facts the anti-trust act did not apply. It said:

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality." 13 (329).

Discussing the contention that the first Employers' Liability Act (34 Stat. at L. 232) was constitutional although it embraced subjects not within the power of Congress to regulate commerce:

"because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress, * * *"

the Court said:

"* * * To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state

concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. * * *" *The Employers' Liability Cases*, 207 U. S. 463, 502 (52 L. Ed. 297, 311).

In *Mobile* v. *Kimball*, 102 U. S. 691 (26 L. Ed. 238), the Court said that the subjects upon which Congress could act under its power to regulate interstate commerce were of infinite variety.

"* * * Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. * * *" 697 (239).

Without the power of Congress there would be

"no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation." 697 (239).

In *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U. S. 557 (30 L. Ed. 244), the state legislature undertook to regulate freight rates irrespective of whether the freight was an interstate shipment. The Court said:

"It cannot be too strongly insisted upon that the right of continuous transportation from one end of the

country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the states and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. * * *" 572-3 (249).

Those who advocate the validity of the Hawes-Cooper Act will doubtless not deny that the states lack the power to prohibit the sale within their borders of any article of an unexceptional nature moving therein; for the attempted exercise of any such power on the part of a state would be in conflict with the fundamental institutions of the government of this country. In the case of prison-made goods, likewise unexceptional in their nature, this conflict is suspended by these advocates and states are allowed to prohibit the sale within their borders of such goods shipped from another State. We had thought that this change could be brought about only by an amendment to the Constitution; but now it appears that only a short cut by way of a congressional enactment is necessary to move from invalidity to validity.

Conclusion.

The purpose of the Hawes-Cooper Act is plainly seen. It is to free labor organizations and certain manufacturers from the competition of prison labor. To open the door to such legislation on the part of Congress is to erect like barriers in favor of any activity, industry or organization which becomes politically strong enough to compel favorable legislation. It would vest Congress with the power to say, according to its whim or fancy, what articles should move and what should not move among the states. It would

place in the hands of a majority in Congress the power to select any state, either on account of its location, industries, or for any other reason political or otherwise, and pass laws confining the products of such state within its own borders. We had thought that an embargo could be lifted by Congress against only foreign products. But now a power is claimed which if permitted to be exercised would result in erecting barriers around unfavored states. The conflicting and irritating practice of the states before the Constitution was adopted would be increased a thousand fold through the exercise by Congress of this newly-found power over the vast commerce of this country.

Today it is prison labor which its opponents after beating at the door of Congress for fifty years have succeeded in outlawing. Tomorrow it may be non-union labor.

It is therefore respectfully submitted that this case is one in which in a final judgment in the highest court of the State of Ohio there is drawn in question the validity of a statute of the State of Ohio on the ground of its being repugnant to the Constitution of the United States and the decision of the highest court of Ohio is in favor of its validity. Nor is the decision of the state court in accord with the decision of this Court rendered in other cases and specially in the *Child Labor Case* and the *Child Labor Tax Case, supra.*

There was also drawn in question the validity of an Act of Congress which petitioner alleges to be in conflict with the Constitution of the United States and this challenge was not sustained by the Supreme Court of Ohio.

Respectfully submitted,

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Of Counsel.

Opinion of the Court of Appeals of Cuyahoga County, State of Ohio, Eighth District.

No. 14526.

ASA H. WHITFIELD,
Plaintiff-in-Error.

vs.

THE STATE OF OHIO,
Defendant-in-Error.

February 18, 1935.

Error to the Municipal Court of Cleveland.

LEVINE, J.:

Plaintiff-in-error, who was defendant in the trial court, was convicted upon an affidavit which charges that he unlawfully sold convict made goods, in violation of Section 2228-1 General Code of Ohio. Error proceedings were instituted in this court seeking the reversal of said conviction. The charge was incorporated in an affidavit in the following form:

> "Before me, Paul DeGrandis, Deputy Clerk of the Municipal Court of the City of Cleveland, personally came R. C. Kissack who being duly sworn according to law, deposeth and saith that on or about the 2nd day of October, A. D. 1934, at the City of Cleveland in said County of Cuyahoga, one Asa H. Whitfield did unlawfully sell on the open market, certain goods, wares or merchandise, to-wit: one dozen Chambray men's work shirts, which said merchandise was manufactured in

whole or in part by convicts or prisoners at Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at the time of manufacturing same not being on parole or probation."

Second Count.

"R. C. Kissack, who being duly sworn according to law, deposeth and saith, that on or about the 2nd day of October, A. D. 1934, at the City of Cleveland in said County of Cuyahoga, one Asa H. Whitfield did unlawfully sell for shipment to R. C. Kissack, via Railway Express from Wetumpka Prison in the State of Alabama to R. C. Kissack in the City of Lakewood, Ohio, certain goods, wares or merchandise, to-wit: Six dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at said time not being on parole or probation and further deponent says not, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Ohio."

A demurrer was filed on the ground that the law on which said affidavit is based is unconstitutional. The demurrer was overruled by the trial court.

Section 2228-1 General Code provides that:

"After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other state by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this state."

Section 2228-2 General Code provides that:

"Whoever violates any of the provisions of the next preceding section shall be fined not less than $25.00 nor more than $50.00 for the first offense and not less than $50.00 nor more than $200.00 for each subsequent offense (Effective January 19th, 1934)."

An agreed Statement of Facts was submitted to the trial Judge, which reads as follows:

"That on the 2nd day of October, A. D. 1934, the defendant, Asa H. Whitfield of Montgomery, Alabama, as agent for the State of Alabama, sold to R. C. Kissack in the City of Cleveland, Ohio, on the open market, to-wit, at the Cleveland Hotel, one dozen Chambray men's work shirts for the consideration of $5.25; that said shirts were manufactured in whole by prisoners, confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time of manufacturing said shirts were not on parole or probation; that said shirts were shipped in to the City of Cleveland, via U. S. Parcel Post from Wetumpka Prison, State of Alabama, to be sold on the open market, in said City of Cleveland, Ohio; that said goods were sold in the original package, as shipped by interstate commerce into the State of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold."

It is further stipulated:

"That on the 2nd day of October, A. D. 1934, the defendant, Asa H. Whitfield, of Montgomery, Alabama, as agent for the State of Alabama, sold to R. C. Kissack, in the City of Cleveland, Ohio, on the open market, to-wit, at the Hotel Cleveland, six dozen Chambray men's work shirts, for the consideration of $31.50; that the said shirts were not then delivered to the said R. C. Kissack but the defendant, Asa H. Whitfield, agreed to ship same to the residence of R. C. Kissack which is in Lakewood, Ohio, via railway express, from Wetumpka Prison, in the State of Alabama; that the said shirts have been manufactured in whole by prisoners confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time they manufactured said shirts, were not on parole or probation; that said goods were sold in the original package as shipped, by interstate commerce into the State of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold."

Plaintiff-in-error relies mainly upon the contention that the judgment rendered by the trial court is contrary to the Constitution of the United States, and that Section 2228-1 General Code is likewise contrary to the Constitution of the United States, in that it violates Article XIV, Section 1, of the Amendments to the Constitution, and also Article 1, Section 8, Clause 3 of the Constitution.

Article XIV, Section 1, of the Amendments to the Federal Constitution reads, in part, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Article 1, Section 8, Clause 3, denominated "Interstate Commerce Clause," reads as follows:

> "The Congress shall have power * * * (3) To regulate Commerce with Foreign Nations and among the several States and with the Indian Tribes."

It is urged that Section 2228-1 when it provides "that goods, wares or merchandise, manufactured or mined wholly or in part in any other State by convicts or prisoners shall be excluded from the open market in the State of Ohio," abridges the privileges and immunities of citizens of the United States, in that it deprives a citizen of the United States, who has merchandise made by convicts of another State, from competing with convict-made goods in the State of Ohio.

It is further urged that the Interstate Commerce clause of the Federal Constitution vests sole authority to regulate

commerce among the several States in the Congress of the United States; that the State of Ohio, by virtue of said Section 2228-1, attempts to regulate interstate commerce between itself and other States of the Union.

It has been held in *Brown* v. *Maryland,* 12 Wheaton, 419, that "The State cannot divide an Interstate Journey into segments."

It is insisted that the power to regulate interstate commerce granted by the Constitution to Congress is exclusive in its character, so as to preclude the States from exercising such right or power. It is likewise insisted that Congress has the power not only to authorize the importation between the States, but that it also has the power to authorize importers to sell, and that the State of Ohio therefore has no power to impose a law which in any way hinders or prohibits the free flow of commerce among the States.

Since Congress has the right to authorize the importation between the States, it also has the power to authorize the importers to sell. The State of Ohio, therefore, it is contended, has no power to impose a law which in any way prohibits the free flow of commerce between the States.

In its final analysis, the question presented to us may be summarized as follows: Granting that it is within the exclusive power of Congress to authorize the importation of goods and merchandise of other States into the State of Ohio, to what extent, if any, is the State of Ohio possessed of power to regulate the sale of goods that have been so imported from another State?

Section 2228-1 General Code was enacted in accordance with the spirit of Article II, Section 41 of the Constitution of the State of Ohio, and reads as follows:

> "Abolishing prison contract labor. Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions

and reformatories in the State; and no person in any such penal institutions or reformatories while under sentence thereto shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the produce or profit of his work, shall be sold, farmed out, controlled or given away; and the goods made by persons under sentence to any penal institutions or reformatories without the State of Ohio, and such goods made within the State of Ohio, excepting those disposed of to the State or any political subdivision thereof or to any public institution owned and managed or controlled by the State or any political subdivision thereof, *shall not be sold* within this State unless the same are conspicuously marked 'prison made'. Nothing herein contained shall be construed to prevent the passage of laws providing their labor may be disposed of to the State or any political subdivision thereof, or for or to any public institution owned or managed and controlled by the State or any political subdivision thereof. (Adopted September 13th, 1918.) And see Section 14170 General Code."

The laws of Ohio prohibit the manufacture of convict-made goods in Ohio, except for use in correctional institutions, and thereby preclude their sale in the open market. The argument of plaintiff-in-error to the effect that Section 2228-1 of the General Code deprives citizens of the United States who have merchandise made by convicts of other States from competing with convict-made goods in the State of Ohio, appears to us without force, since the use to be made of convict-made goods in Ohio is limited to correctional and other public institutions.

As we interpret the laws of Ohio, there can be no sale in the open market of goods made by convicts in the State of Ohio; and that the use of such manufactured convict-made goods in Ohio is limited so as to preclude their sale in the open market. There is, therefore, no discrimination against

citizens of other States when they are prohibited from selling convict-made goods manufactured in another State in the open market in the State of Ohio.

We are cited to the case of *Arnold* v. *Yanders,* 56 O. S., page 417, in which the court held that the Act of May 19th, 1894, 91 O. L. 546, entitled: "An act to Regulate the sale of convict-made goods, wares and merchandise, manufactured by convicts in other States," is in conflict with section eight of article one of the constitution of the United States and is therefore void. In the opinion the court said:

> "It is not competent for a State legislature to declare that convict-made goods are not articles of traffic and commerce, and then to act upon such declaration, and discriminate against such goods, or exclude them from the State by unfriendly legislation. Whatever Congress, either by silence or by statute, recognizes as an article of traffic and commerce, must be so received and treated by the several States."

> "There is no act of Congress declaring that convict-made goods are not fit for traffic and commerce, and it therefore follows that such goods are the subject of commerce, and when transported from one State to another for sale or exchange, become articles of interstate commerce, and entitled to be protected as such; and any discrimination against such goods in the State where offered for sale is unconstitutional."

The basis of the decision it will be seen is that Congress has not at all times excluded convict-made goods as articles of traffic and commerce. On page 431 of the opinion in *Arnold* v. *Yanders, supra,* the court said:

> "The mere silence of Congress is not sufficient to authorize a State legislature to legislate upon a subject vested by the Constitution in Congress, but such silence is to be regarded as evincing the intention of

Congress that the powers shall remain where the Constitution has placed them.

"To give a State legislature power to legislate in such cases, required an act of Congress to that effect. (*Leisy* v. *Hardin,* 135 U. S. 100; *Welton* v. *Missouri,* 91 U. S. 275.)"

The basis of the decision of the Supreme Court of Ohio in *Arnold* v. *Yanders, supra,* no longer exists.

The Act of Congress, approved January 19th, 1929, and effective January 19th, 1934, known as the Hawes-Cooper Act, 45 Stat. 1084; 49 U. S. C. A., Section 65, supplied authority which empowered the State of Ohio to act. The Hawes-Cooper Act is entitled: "An act to divest goods, wares and merchandise, manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases."

"That all goods, wares and merchandise, manufactured, produced or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, except commodities manufactured in Federal, penal or correctional institutions for use by the Federal Government, transported into any State or territory of the United States and remaining therein for use, consumption, sale or storage, shall upon arrival and delivery in such State or territory be subject to the same extent and in the same manner as though such goods, wares and merchandise, had been manufactured, produced, or mined in such State or territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise."

The effect of the Hawes-Cooper Act is to place convict-made goods manufactured in another State in the same category as convict-made goods manufactured in the State of Ohio, and subject to the authority and control of the State of Ohio.

We conclude:

First: That Congress, to the exclusion of the States, is vested with power to regulate interstate commerce; and that until Congress exercised its authority and enacted regulation on the subject, such commerce was free and unrestricted. It is just as well settled that Congress may carry its regulation of interstate commerce to the point of prohibition of the interstate transportation of such articles as may spread evil or harm to the people of States other than the State of origin.

Clark Distilling Co. v. *Western Maryland Ry. Co.*, 242 U. S. 211, 61 L. Ed. 326;

Brooks v. *United States*, 267 U. S. 432, 69 L. Ed. 699;

Bennett v. *United States*, 194 Fed. 630;

West Virginia v. *Adams Express Co.*, 219 Fed. 794, 12 C. J. 60.

Second: Congress may, in the exercise of its power to regulate interstate commerce, place an article under the jurisdiction of the police power of the State upon its arrival in such State.

Leisy v. *Hardin*, 135 U. S. 100.

In *Bowman* v. *Railway Company*, 125 U. S. 495, 31 L. Ed. 700, the Court held:

> "The transportation of commodities between the States shall be free except where it is positively restricted by Congress itself, or by the States in particular cases by the express permission of Congress."

Third: Since the Hawes-Cooper Act expressly makes convict-made goods in other States transported to another State subject to the jurisdiction and regulation of the State to which they were transported, the State of Ohio, under its police power may pass laws for the promotion of

the general welfare and prosperity of its citizens. The police power of the State is the inherent power to enact laws necessary to protect the order, safety, health, morals and general welfare of the people of the State.

Fourth: The State of Ohio may, by legislation, determine the public policy of the State and declare that the sale of prison-made goods in the open market will result in the destruction of the general welfare, prosperity and safety of the citizens of the State.

> "There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based." *Bailey* v. *Alabama*, 219 U. S. 219, 55 L. Ed. 191.

It is a matter of common knowledge that industries employing free labor required to pay taxes, interest on capital, and other items of overhead which are not included in the cost of prison-made goods, can not compete successfully in the open market with prison-made goods and maintain the standard of wages which enables free labor to earn a decent living, or enable such industries to meet wage standards which have been established under national and State legislation. That prison-made goods can be sold in the open market at a price which is below the actual cost of production of manufacturers employing free labor, is patent.

Fifth: Under the terms of the Hawes-Cooper Act, the products of prisoners of other States are, upon their arrival and delivery in Ohio, placed upon the same footing as prison-made goods "produced in such State" and the legislature may provide that they shall not be sold in the open market in Ohio.

Sixth: In *Arnold* v. *Yanders*, 56 O. S., page 422, the court declared void the act of the Ohio Legislature, which

sought to regulate the sale of goods produced by prisoners in other States. The sole basis of the decision was that whatever Congress, either by silence or by statute, recognized as articles of traffic and commerce, must be so received and treated by the several States, and that since there is no act of Congress declaring that convict-made goods are not fit for traffic and commerce, it therefore follows that such goods are the subject of commerce, and when transported from one State to another for sale or exchange become articles of interstate commerce, and are entitled to be protected as such; and any discrimination against such goods in the State where offered for sale is unconstitutional. The necessary permission of Congress which was then lacking is now supplied by the Hawes-Cooper Act, and the legislature therefore may constitutionally in conformity with long standing public policy, take such steps as may be necessary to prevent the products of prisoners from other States from entering the open market of Ohio and wield their evil influence.

In view of the above considerations, the judgment of the Municipal Court is affirmed.

Lieghly, P. J., and Terrell, J., concur in judgment.

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